

The Third Player-Illegal Combatant

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It is the fate of democracy that not all means are suitable in its eyes, and not all of the methods employed by it are open to it. Democracy quite often fights with one hand tied behind its back.¹

I. INTRODUCTION

On Wednesday, January 7, 2015, two masked men armed with automatic weapons broke into the offices of the French satirical magazine *Charlie Hebdo* in Paris. They shot and killed twelve people, and injured another ten.² Later on, Al Qaida took responsibility for the attack.³ In the weeks that followed, three more terror attacks were perpetrated on European soil.⁴ Since the beginning of 2015, a number of other terror attacks have taken place in various countries around the world.⁵ Unfortunately, terror attacks have become a routine part of life, and this new truth triggers the importance of discussing the legal status of terrorist organizations and persons who act on their behalf.

These terror attacks illustrate two central changes that terrorism has created in the nature of international warfare. First, the war against terror is an asymmetrical war, as opposed to the traditional notion of war between one sovereign nation and another. Terrorists are not combatants belonging to the military forces of a state. Through such status, they challenge the rules of international humanitarian law. Second, these terrorists are not the freedom fighters of the colonial age, seeking to oust an occupying force and gain their own independence. Instead, these terrorists seek to harm

1. HCJ 5100/94 *Pub. Comm. Against Torture v. Israel* 53(4) PD 817, ¶ 39 (1999) (Isr.).

2. *12 Dead in Terror Attack at the Offices of the Satirical Weekly in Paris that Published Caricatures of ISIS and the Prophet Mohamed*, HAARETZ (Jan. 7, 2015) (Isr.), <http://www.haaretz.co.il/news/world/europe/1.2532956>.

3. *The Two Brothers Who Perpetrated the Attack on Charlie Hebdo Received Combat Training in Yemen*, HAARETZ (Jan. 11, 2015) (Isr.), <http://www.haaretz.co.il/news/world/europe/1.2533970>.

4. *Report: 4 Hostages Killed in A Terror Attack in A Paris Supermarket; The Terrorist Was Killed*, MAKO (Jan. 9, 2015) (Isr.), http://www.mako.co.il/news-world/international-q1_2015/Article-8443952199eca41004.htm; *Denmark: One Killed and Three Wounded in a Shooting Attack*, GALATZ (Feb. 14, 2015) (Isr.), <http://glz.co.il/1064-58331-he/Galatz.aspx>; *Terror in Denmark: Jewish Man Killed Outside a Synagogue*, MAKO (Feb. 15, 2015) (Isr.), http://www.mako.co.il/news-world/international-q1_2015/Article-ac108e05a3a8b41004.htm.

5. *See Kenya attack: 147 dead in Garissa University assault*, BBC (Apr. 3, 2015), <http://www.bbc.com/news/world-africa-32169080>; David D. Kirkpatrick, *Tunisia Museum Attack Is Blow to Nation's Democratic Shift*, N.Y. TIMES (Mar. 18, 2015), http://www.nytimes.com/2015/03/19/world/africa/gunmen-attack-tunis-bardo-national-museum.html?_r=0; Salman Masood, *Rebels Tied to Blackout Across Most of Pakistan*, N.Y. TIMES (Jan. 25, 2015), http://www.nytimes.com/2015/01/26/world/asia/widespread-blackout-in-pakistan-deals-another-blow-to-government.html?_r=1.

democratic regimes and generate a new world order that suits their ideology and beliefs.

Despite recent changes that have occurred with respect to terrorist organizations, international law has not yet adapted to the new reality. The laws of war, which regulate the rules that apply to combatant forces at times of armed conflict, were drafted in an era in which wars usually took place between two sovereign nations. Nowadays, in many cases, wars take place between a state and non-state organization, including terrorist organizations. For example, consider the United States campaign in Afghanistan, as well as the ongoing war between the State of Israel and terrorist organizations in Judea and Samaria and the Gaza Strip.⁶

Terrorists do not distinguish between military forces and civilians, which ultimately calls into question the most basic of distinctions in international law. Because the laws of war do not provide a response for situations where an army of a democratic country faces a terrorist organization, military forces are required to act in ways that do not necessarily comply with international law. For example, the Israel Defense Forces (IDF) employed the use of Palestinian civilians as human shields, an action known as “Neighbor Procedure.”⁷ As will be discussed below, another example is what is known as a “targeted killing” policy. Thus, it is clear that international law has failed to adjust to the current situation, and the failure to provide states with tools to deal with the threat of terrorism has led and will continue to lead to civilian harm on both sides of the fence. It is important to note that international laws of war are based on the presumption that each of the parties to a conflict takes care of its own civilians.⁸ In the case of a dispute between a terrorist organization and a state, this presumption is invalid. In those disputes, it is often clear that the terrorist organization intentionally puts its own citizens at risk, acting from within population concentrations and concealing its weaponry there.

This article will examine the current status of the international law of war with respect to terrorist organizations and their operatives. The central

6. Emanuel Gross, *The Struggle of a Democracy against the Terror of Suicide Bombers: Ideological and Legal Aspects*, 22 WIS. INT'L L.J. 597, *passim* (2004) [hereinafter Gross, *Democratic Struggle Against Terrorism*].

7. See generally HCJ 3799/02 *Adalah v. Head of Central Command* (3) PD 67 (2005) (Isr.) (considering the practice by IDF of using Palestinian civilians as human shields—an action known as “Neighbor Procedure”—as being illegal and contradicting international law).

8. Pnina S. Baruch, *Legal Dilemmas in Asymmetrical Combat Confrontations*, 4 MIL. & STRATEGIC AFF. 39 (2012) (Isr.).

argument of this article is that international humanitarian law is unable to cope with the reality of international terrorism. The basic definitions of “combatant” and “civilian” are not suitable within the context of the age of terrorism.⁹ In the past, combatants were presumed to be either a member of a state, or in the alternative, freedom fighters expressing an idea of resistance against a colonial occupation. Terrorist organizations and their members are not freedom fighters, but rather, are members of extreme organizations that aim to force a new order on the countries of the world.¹⁰ Therefore, because terrorists are neither combatants nor civilians, the international law of war must recognize a third category of “illegal combatants,” which will equip states with appropriate tools for fighting terrorism.

Part II of this article will discuss the definition of “terrorism” in international law. First, I will set out the various—failed—attempts made by authors of international law to reach an agreed definition of the term “terrorism.” Second, I will discuss the definition of “terrorism” as it exists under the national laws of several countries, and will analyze ways in which those definitions can help shape a universally agreeable definition. Finally, this section will discuss the Rome Statute, which set up the International Criminal Court (“ICC”), and why the “crime of terrorism” was not included within the ICC’s jurisdiction.

Part III will discuss, in detail, the fundamental principle of international law – the principle of war—specifically, the distinction between combatants and civilians. I will examine how this principle relates to international humanitarian law, which recognizes only two categories, civilians and combatants. Further, I will discuss the significance of this categorization with respect to terrorist organizations and the ability of states to harm terrorists. The second part of this section will set out the principle of proportionality, which provides that the military benefit must be balanced against the damage that might be caused to the civilian population, and the difficulty in applying the principle of proportionality in the context of the war against terror.

Part IV will discuss the issue of the status of terrorists in international law. Because their position is not regulated explicitly, this section will examine whether it is possible to include them under one or other of the currently existing categories, combatants or civilians. To this end, this section will set out each of the categories (or sub-categories), the protections

9. The unsuitability of international law in dealing with terrorist organizations is noted in the *John Doe* case: “[W]e cannot ignore the fact that the provisions of international law that exist today have not been adapted to changing realities and to the phenomenon of terrorism that is changing the face and characteristics of armed conflicts and those who participate in them.” CrimA 6659/06 *John Doe v. State of Israel* (4) PD 359, ¶9 (2008) (Isr.).

10. Gross, *Democratic Struggle Against Terrorism*, *supra* note 6, at 75.

that they afford, and the conditions that must be met in order for them to apply. Next, this section will examine whether terrorists meet the necessary conditions with respect to each category, and whether it would even be appropriate to grant them the defenses they would be entitled to if they did qualify under those categories.

Part V will focus on the Supreme Court ruling in Israel in the targeted killing case, as a test case that demonstrates the deficiencies of international law with respect to a democratic country's fight against terror organizations. I will analyze the Court's holding itself, as well as set out its failure which both embody and emphasize the incompatibility of the rules of international humanitarian law to the war on international terrorism.

Finally, Part VI will focus on a proposed third category—illegal combatants. First, because this category has not yet been recognized in international law, this section will discuss both its definition and overall significance. Second, this section will analyze the Red Cross' position with respect to recognizing illegal combatants as a third category and the development of humanitarian law so as to adapt to modern warfare against terrorism. Finally, this section will set out countries that have recognized this category in their legal systems, and will analyze the way in which the category has been defined.

II. TERRORISM IN INTERNATIONAL LAW

A. The Definition of Terrorism in International Law

The terror attacks that have occurred around the globe since the start of 2015 illustrate, yet again, the fact that terrorism is a broad and worldwide phenomenon. In light of this increase in terrorism, it is not surprising that a variety of definitions for the term “terrorism” in international law have been proposed over the years. These varying definitions of terrorism reflect the unique characteristics of the term, which distinguish it from ordinary criminal acts.

The first attempt to define the phenomenon of terrorism was in 1937, when the Convention for the Prevention and Punishment of Terrorism was drafted. This Convention was drafted under the auspices of the League of Nations, but at the end of the day, did not come into force.¹¹ Almost 50 years

11. HILLI M. EVEN CHEN, *TERRORISM AND INTERNATIONAL HUMANITARIAN LAW: THE DISTINCTION BETWEEN COMBATANTS AND CIVILIANS IN THE MODERN FIELD OF COMBAT*, 32 (Inst. for Legis. Res. & Comp.L., Hebrew U. of Jerusalem, 2010) (Isr.).

later, a resolution was passed by the Security Council of the United Nations in 1994 regarding measures for overcoming international terrorism, in which it was resolved that:

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.¹²

This definition suggests that the motive for perpetrating acts of terrorism is ideological, and that the effect of such acts is that they cause a sense of panic and concern among the population at large, or a particular group of persons. In addition to this resolution, a number of international treaties were executed¹³ with the purpose of regulating the methods by which terrorist activity could be combatted. However, these treaties lack any operative force, since at present, there is still no consensus in the international community regarding the substance of the acts of terrorism that the treaties are intended to deal with.¹⁴

For decades, authors of international law avoided using or defining the term “terrorism.” Instead, they preferred to define the possibilities of suing and extraditing persons who perpetrated acts of violence against aircraft, airports, diplomats, etc.¹⁵ The International Terrorism Conference¹⁶ attempted, between 1972-1979, to adopt an agreed definition of terrorism, but this was unsuccessful, mainly due to the insistence of the G-77¹⁷ that “national liberation movements” were not to be included in the definition of terrorism. Later conferences which took place in the 1990s were also unsuccessful in reaching an agreed definition of the term “terrorism.”¹⁸ Even in the wake of

12. G.A. Res. 49/60, (I) ¶ 3 (Dec. 9, 1994).

13. *See generally*, U.N. Convention for the Suppression of Terrorist Bombing, (Dec. 15, 1997); G.A. Res. 54/109 (Dec. 9, 1999) [hereinafter U.N. Convention for the Suppression of Financing of Terrorism].

14. Gross, *Democratic Struggle against Terrorism*, *supra* note 6, at 35.

15. Gilbert Guillaume, *Terrorism and International Law*, 53 INT'L & COMP. L.Q. 537, 538 (2004) (UK).

16. G.A. Res. 51/210, ¶ 9 (Dec. 17, 1996) (establishing an Ad Hoc Committee to develop and elaborate conventions suppressing terrorism, and to “address means of further developing a comprehensive legal framework of conventions dealing with international terrorism”).

17. G-77 is a group of seventy-seven developing countries which was set up in 1964, and which includes many Islamic countries. *About the Group of 77*, THE GROUP OF 77, <http://www.g77.org> (last visited Feb. 2, 2016); *see also* G.A. Res. 42/159 ¶ 1 (Dec. 7, 1987) (stating that one of the purposes of holding an international conference was to define the term “terrorism” and distinguish it from the struggle of peoples for national liberation).

18. Guillaume, *supra* note 15, at 539.

the September 11, 2001, terrorist attacks in the U.S., the U.N. Security Council was unable to come up with a clear definition of the term.¹⁹

Despite the lack of an agreed-upon definition in international law, many independent countries have enacted their own laws defining the term. The common definition in many countries is the “use or the threat of use of violence against a person or property (including essential services) perpetrated with the intent of terrifying the population or with the intent of forcing a person, government or organization to do or not to do any action; or out of political, religious or ideological motives.”²⁰ A similar definition may be found in Israeli law,²¹ American law,²²

19. *Id.* at 539–40.

20. Mordechai Kremnitzer, *Terror and Democracy: the Case of Israel*, 14 HAMISHPAT 9, 10 (2010) (Isr.).

21. Prohibition of Financing of Terrorism Law, 5765-2005, SH No. 1973 § 1 (Isr.). defines an “act of terrorism” as:

(a) An act that constitutes an offense or a threat of committing an act that constitutes an offense done or planned to be done in order to influence a political, ideological or religious matter, in which all of the following exist: (1) It is done or is planned to be done with the aim of arousing fear or panic among the public or with the aim of forcing the government or some other governmental authority, including the government or governmental authority of a foreign state, to do an act or not to do an act (. . .); (2) the act done or planned to be done constitutes—(a) real harm to the body or liberty of a person, or placing a person at risk of death or serious injury; (b) creation of a real danger to the health or security of the public; (c) serious harm to property; (d) serious disruption of infrastructure, systems or essential services.

Note that the Prevention of Terrorism Ordinance, 5708-1948, contains a very broad definition of the term “terrorist organization” (section 1): “A group of persons that in its activities employs acts of violence that might cause the death or injury of a person, or threats of such violent actions.”

22. International terrorism, under 18 U.S.C. § 2331 (2009) is defined as:

(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum

The definition of domestic terrorism was modified by the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism*

British law,²³ and Canadian law.²⁴

These countries' definitions share a common desire to prevent harm to individuals and to protect persons and property from hostile activity, the nature of which is to spread fear and panic. Another common theme amongst the definitions is the suggestion that the reason for perpetration

(USA PATRIOT ACT) *Act of 2001*, Pub. L. No. 107-56, § 802, 115 Stat. 272 (amending 18 U.S.C. § 2331 (2001)):

(5) the term 'domestic terrorism' means activities that - (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended - (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.

23. Terrorism Act 2000, c. 11, § 1 (UK):

(1) . . . 'terrorism' means the use or threat of action where- (a) the action falls within subsection (2), (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause. (2) Action falls within this subsection if it- (a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person's life, other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system. (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

24. Criminal Code, R.S.C. 1985, c. C-46 (Can.):

'terrorist activity' means . . . (b) an act or omission, in or outside Canada, (i) that is committed (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and (ii) that intentionally (A) causes death or serious bodily harm to a person by the use of violence, (B) endangers a person's life, (C) causes a serious risk to the health or safety of the public or any segment of the public, (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or (E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C), and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counseling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

of the terror attack are ideological reasons. However, while the definitions do share some common elements, there are also considerable differences amongst the various definitions. Some provide that the primary focus of protection is the civilian population, while others expand this protection to cover military facilities as well. A difficulty that becomes clear through review of these definitions is that all of them are drafted in a generalized form, which sometimes leads to sweeping application of them to legitimate actions that may take place under a democratic regime.²⁵

The differences among the various definitions and the generalized nature of their drafting illustrate the difficulty in defining the term “terrorism.” While it is one thing to come up with a clear definition for the term within a single country, it is entirely larger step to attempt to draft a universal, international and agreed upon definition of this term. Thus, despite the considerable importance of prescribing an agreed definition of the terrorism, which could facilitate adoption of international laws that better meet the needs of the modern realities within the context of the war on terror, it is unlikely that an agreement on an international definition will be reached in the near future.

In light of this unlikelihood, the result is that the legal tools countries currently have for dealing with the threat of international terrorism are only the offenses that presently exist in international law, which imposes an obligation on every person as a person.²⁶ In order to analyze whether these offenses are sufficient to provide a response to the struggle of countries against international terrorism, we shall examine the offenses in the Rome Statute (that fall within ICC jurisdiction), the attempts to include offenses in the Statute that relate to terrorism, and the actual jurisdiction of the Court over crimes of terrorism.

B. The Rome Statute

The idea of creating an international criminal court was first raised in the Peace Treaty, which was executed at Versailles at the end of the First

25. For instance, use of the sections of the law relating to terrorism for the purpose of suppressing legitimate protests or against aggressive actions taken by the police, which are aimed at preserving public order and which are effected proportionately. See EMANUEL GROSS, *THE STRUGGLE OF DEMOCRACY AGAINST SUICIDE TERRORISM – IS THE FREE WORLD EQUIPPED WITH MORAL AND LEGAL TOOLS IN THIS STRUGGLE?*, 219, 224 (Shulamit Almog & Dorit Beinisch & Yaar Rotem eds., Dalia Dorner Books 2010).

26. Gross, *Democratic Struggle Against Terrorism*, *supra* note 6, at 35.

World War. After World War II, and following the atrocities that took place during the course of that War, the need to set up an international criminal court became even more acute.²⁷ During the subsequent decades, this initiative was stalled, mainly due to the political freeze, which was a result of the Cold War. After the fall of the Soviet Union, however, there was again another push toward developing an international criminal court. At the start of the 1990s, following formidable disputes in Yugoslavia and Rwanda, the U.N. General Assembly decided to advance the preparation of a constitution for an international criminal court.²⁸ The Rome Statute,²⁹ which sets up the International Criminal Court, was passed with the support of 120 countries, despite the opposition of 7 countries (including the United States, China and Israel).³⁰

The Court (ICC) commenced operating in July 2002. The ICC was set up as a permanent judicial entity that would handle crimes of international importance. As distinct from special ad hoc tribunals, which were set up after the commission of severe crimes during armed conflicts, the Court is a permanent institution and can thus provide significant ex-ante deterrence.³¹ The Court's jurisdiction covers four classes of offenses, which are defined in its constitution:³² genocide,³³ crimes against humanity,³⁴ war crimes,³⁵ and the crime of aggression. The first three crimes are set out clearly in accordance with the principle of legality, in Articles 6-8 of the Constitution of the Court. On the other hand, the crime of aggression was not initially defined in the Constitution. There had been a desire to include crimes of terrorism under this category, but that desire was overwhelmed by the lack of agreement among countries drafting the Constitution, as to the definition of "terrorism."³⁶ Therefore, the crime of aggression offense was enacted with the express condition that the Court would only be able to exercise its jurisdiction over the crime of aggression if it adopts a provision

27. Alan Baker, *The International Criminal Court (ICC)*, 16 L. & MIL. 879, 880 (2003) (Isr.).

28. *Id.* at 881.

29. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute].

30. Shavit Matias & Miri Sharon, *The International Criminal Court*, 9 HAMISHPAT 23, 24 (2004) (Isr.).

31. ORNA BEN-NAPHTALI & YUVAL SHANI, INTERNATIONAL LAW BETWEEN WAR AND PEACE 320 (Tali Nir ed., 2006) (Isr.).

32. Rome Statute, *supra* note 29, at art. 5(1).

33. *Id.* at art. 6.

34. *Id.* at art. 7.

35. *Id.* at art. 8.

36. Gross, *Democratic Struggle Against Terrorism*, *supra* note 6, at 697.

defining the crime.³⁷ In fact, this provision remains, and continues to render the offense a dead letter in the ICC's Constitution today.

The crime of terrorism, however, is defined as one of the crimes that fall under the jurisdiction of the Court at all. The draft of the Statute included a definition of the term "terrorism,"³⁸ which sought to include acts of terror within the jurisdiction of the Court.³⁹ Nevertheless, there has been no international agreement on the definition of the term "terrorism." The objection to defining terrorism and including it within ICC jurisdiction has come primarily from Western countries. They were concerned about politicization of the discourse and felt that it would be better to allow this crime to be handled by national judicial instances.⁴⁰

37. Rome Statute, *supra* note 29, at art. 5(2).

38. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/2 (Vol. III), art. 5 (July 17, 1999) [hereinafter U.N. Diplomatic Conference], provides as follows:

For the purposes of the present Statute, crimes of terrorism means: (1) Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them; (2) An offence under the following Conventions: (a) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; (b) Convention for the Suppression of Unlawful Seizure of Aircraft; (c) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; (d) International Convention against the Taking of Hostages; (e) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; (f) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf; (3) An offence involving use of firearms, weapons, explosives and dangerous substances when used as a means to perpetuate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations or serious damage to property.

39. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/13 (Vol. I) (1998) [hereinafter U.N. Diplomatic Conference].

40. Baker, *supra* note 27, at 883. This argument does not hold water because the concern of politicization is not unique to terrorism, and could arise with respect to the existing offenses in the Rome Statute. For example, Israel chose not to become a party to the Rome Statute (despite its involvement in the establishment of the Court), because of its objection to including the settlement of populations in occupied territory as being a war crime. This is a politically explosive issue, which is at the core of the Israel-Palestinian dispute. See also Aviv Cohen, *Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorism*, 20:2 MICH. ST. INT'L L. REV. 219 *passim* (2011).

The principal arguments for excluding the crime of terrorism from ICC jurisdiction include: that the crime of terrorism is of a substantially different nature than other crimes defined in the Statute, a concern that the Court will be overburdened with cases that are of lesser importance, and that states are better able to deal with such crimes efficiently within their internal laws.⁴¹ A number of countries submitted a proposal for inclusion of the crime of terrorism under the commission of crimes against humanity,⁴² but that proposal was rejected as well.⁴³ Lastly, the final version of the Rome Statute stated that acts of terrorism are: “serious crimes of concern to the international community,”⁴⁴ but the crime of terrorism was not defined or included within the jurisdiction of the Court.

In 2009, the countries convened once again, in another attempt to formulate a definition of the term crime of aggression, but once again, without success. For that reason, the argument was made that the existing offenses are sufficient and that there is no need to formulate an agreed-upon definition for the crime of aggression.⁴⁵ In 2010, the countries met one more time in an attempt to formulate a universally acceptable wording. After two weeks of intensive discussions, and on the basis of years of preparatory work, an amendment was made to the Rome Statute, and a definition of the crime of aggression was passed:⁴⁶

41. Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 86 (Roy S. K. Lee, ed., 1999).

42. U.N. Diplomatic Conference, *supra* note 39.

(i) An act of terrorism, in all its forms and manifestations involving the use of indiscriminate violence, committed against innocent persons or property intended or calculated to provoke a state of terror, fear and insecurity in the minds of the general public or populations resulting in death or serious bodily injury, or injury to mental or physical health and serious damage to property irrespective of any considerations and purposes of a political, ideological, philosophical, racial, ethnic, religious or of such other nature that may be invoked to justify it, is a crime. (ii) This crime shall also include any serious crime which is the subject matter of a multilateral convention for the elimination of international terrorism which obliges the parties hereto either to extradite or to prosecute an offender.

43. See Proposal Submitted by India, Sri Lanka and Turkey, U.N. Doc. A/CONF.183/C.1/L.27/Rev.1 (July 6, 1998); Johan D. van der Vyver, *Prosecuting Terrorism in International Tribunals*, 24 *EMORY INT’L L. REV.* 527, 538 (2010).

44. Final Act, U.N. Diplomatic Conference, Doc. A/CONF.138/10, annex I, res. (e) (July 17, 1998) [hereinafter Final Act].

45. Report of the Special Working Group on the Crime of Aggression, ICC ASP/7/20/Add.1, annex II, ¶ 13, http://www.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-7-20-Add.1-SWGA%20English.pdf.

46. *The Crime of Aggression*, COALITION FOR THE INT’L CRIM. CT. (last visited Mar. 1, 2016), <http://www.iccnw.org/?mod=aggression>.

'Crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.⁴⁷

Not only does the crime of aggression fail to define "terrorism" or what constitutes an "act of terrorism," but this definition does not even relate to crimes perpetrated by private individuals or by organizations. According to the definition, the crime of aggression is perpetrated by a person with the ability to direct the actions of a state. The definition of the term, "act of aggression," itself, is narrow, and only covers acts done by one state to another state.⁴⁸ The significance of this is that once again, the ICC had the possibility of updating the laws of war and of equipping states with tools appropriate to the modern war against terrorism, but has instead preserved the anachronistic concept that the only kind of war is a conflict between two sovereign states. According to the position of the Court, it only has the possibility of retaining jurisdiction over cases involving acts of terrorism if those acts fall within the ambit of the crimes defined in the Constitution.⁴⁹

Thus, to date, the international community has not yet been able to adopt an agreed-upon definition of crimes of terrorism, despite the ever-increasing terrorist activity harming more countries around the world—even those countries that saw themselves, until recently, as being immune to such acts. Ultimately, however, the increase in international terrorism will force the international community to reach an agreement regarding the nature of terrorism.⁵⁰

III. THE DISTINCTION BETWEEN COMBATANTS AND CIVILIANS

A. The Gist of the Distinction and the Two Category Approach

The Geneva Conventions (1949) are four conventions whose main purpose is to protect individuals at times of hostilities and to impose

47. Rome Statute, *supra* note 29, at art. 8(1).

48. *Id.* at art. 8(2): "'act of aggression' means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."

49. *Can the ICC deal with terrorist acts within its existing jurisdiction?*, ICC (last visited Mar. 1, 2016), http://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/16.aspx.

50. Gross, *Democratic Struggle Against Terrorism*, *supra* note 6, at 41.

restrictions on the powers of combat forces.⁵¹ The two conventions that are relevant to the concerns with respect to illegal combatants are the Third Convention, regarding the protection of prisoners of war,⁵² and the Fourth Convention, regarding the protection of civilians during wartimes.⁵³ The Geneva Conventions only apply to international disputes on the basis of the understanding that armed hostilities that are not international are covered by criminal law.⁵⁴ Two supplementary Protocols were added to the Geneva Conventions in 1977. The First Protocol deals with the resolution of international disputes,⁵⁵ and the Second Protocol deals with local disputes.⁵⁶ The First Protocol expands the definition of war, and includes national liberation wars for the first time. The understanding was that these asymmetrical disputes between a state and a guerilla organization increase concerns regarding the separation of the laws of warfare, and cause harm to the distinction between civilians and combatants.⁵⁷ The Supplementary Protocols specifically address the issue of combatants who are not part of a regular and organized state military force for the first time.⁵⁸

The First Protocol prescribes a basic rule—there is a duty to distinguish between combatants and military targets as opposed to civilians and civilian targets,⁵⁹ the former being legitimate targets of military attack while the latter not being part of hostilities and being prohibited for intentional attack.⁶⁰ This duty, which is known as the “principle of distinction”, is one of the “foundation[al] stones of humanitarian law.”⁶¹ The principle of distinction is set out, *inter alia*, in Article 48 of the First Protocol:

51. BEN-NAPHTALI & SHANI, *supra* note 31, at 130.

52. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

53. Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

54. EVEN CHEN, *supra* note 11, at 48.

55. Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of the Victims of International Armed Conflicts, June 8, 1977 (Protocol I) 1125 U.N.T.S. 3 [hereinafter First Protocol]. Note that the First Protocol constitutes customary law, and thus, also binds those states that have not ratified it, including Israel. See Knut Dormann, *Obligations of International Humanitarian Law*, 4(2) MIL. & STRATEGIC AFF. 11, 12 (2012) (Isr.) [hereinafter Dormann, *Duties*].

56. First Protocol, *supra* note 55, at 609.

57. EVEN CHEN, *supra* note 11, at 48–50.

58. *Id.* at 47.

59. Gross, *Democratic Struggle Against Terrorism*, *supra* note 6, at 661.

60. There are certain conditions under which a civilian population may be attacked.

I will discuss those below, in the context of the principle of proportionality. See *infra* Part III, at 214–17.

61. Even Chen, *supra* note 11, at 21.

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.⁶²

This Article imposes a duty on states to distinguish between the civilian population and the armed forces, and permits them to harm military targets only.⁶³ In addition to this general duty, the principle of distinction imposes specific duties both on the attacking force and on the force being attacked.⁶⁴ The attacking force, for instance, is prohibited from indiscriminate attacks, such as those that are not directed at a specific military target or attacks whose impact cannot be limited due to use of particular combat measures.⁶⁵ The force being attacked is under a duty to employ precautionary measures in order to protect its civilians against the impact of military attacks. Among other things, it must move civilians away from military targets and avoid placing military targets within or near to population centers.⁶⁶

A common argument among commentators on international law is that this fundamental rule leaves only two categories in the Geneva Conventions—civilians and civilian targets, and combatants and military targets. In addition to this, the First Protocol includes a definition of the term “civilian,”⁶⁷ which provides that a civilian is any person who is not a combatant.⁶⁸ In this way, the Protocol actually reinforces the dichotomous distinction between civilians and combatants.⁶⁹ The classification of a person as a civilian or a combatant has implications on the protections that apply to such person, and on the rights to which he is entitled.⁷⁰ This means that the legality of a military action depends on whether its target

62. First Protocol, *supra* note 55, art. 48.

63. *See id.*

64. *See id.* art. 51.

65. *Id.* art. 51(4).

66. *Id.* art. 58.

67. *Id.* art. 50.

68. It is easy to see that this definition is a negative definition. If we examine whether a particular person fits the definition of a combatant, and if we find that he does not meet the criteria, then that means that he is a civilian. Below, I will discuss the problems that arise from this definition, particularly in the specific context of terrorists and terrorist organizations. *See infra* Part IV, at 217–20.

69. *See* First Protocol, *supra* note 55, art. 50.

70. Curtis A. Bradley, *The United States, Israel and Unlawful Combatants*, 12 Green Bag 2d 397, 398–99 (2009).

falls within one of two categories: whilst it is possible to exercise force against any military target, apart from a small number of exceptions,⁷¹ harm to civilians is, as a rule, prohibited.⁷²

In the specific context of terrorism, we can see that harm to the principle of distinction is a central characteristic of the activities of terrorist organizations.⁷³ Firstly, terrorist activities are usually directed towards harming civilians. This can be seen in the terror attack that occurred in France in early 2016,⁷⁴ the central purpose of which was to harm civilians. That is, of course, only one example of many, and many acts of terrorism which take place around the world are done intentionally in order to harm as many civilians, and civilian infrastructure, as possible.⁷⁵ Secondly, terrorists hide among the civilian population and exploit the protections reserved for such population.⁷⁶

With respect to the way in which states cope with terrorist organizations, this categorization is particularly important since it has a direct impact on the scope of operations available to the state. This is because if terrorists fall within the category of combatants, then they can be harmed and if they are taken prisoner, they are entitled to the status of prisoner-of-war. But if they are civilians, they are immune to harm except in a small number of circumstances.⁷⁷ Therefore, the status of terrorists in international law is a critical factor which affects the rules that a state has in the war on terror.

71. First Protocol, *supra* note 55, art. 12, 15. These exceptions include religious or medical teams.

72. *Id.* art. 48. A primary exception to this is civilians who take an active part in hostilities, on which more below.

73. Gross, *Democratic Struggle Against Terrorism*, *supra* note 6, at 597–98.

74. *See supra* Introduction.

75. *See* Associated Press, *After Deadly Kenya Assault, al-Shabab Warns of More Attacks*, HAARETZ (Isr.), Apr. 4, 2015, <http://www.haaretz.com/world-news/1.650480>.

Another current example of this is the attack at the university in Kenya, in which terrorists belonging to the A-Shabab organization killed 147 students. The attack was apparently carried out in revenge against the Kenyan government's policy in Somalia. This is another example of how terrorism is used on the civilian population in order to send a message to government. Additionally, we can see, once again, that the phenomenon of international terrorism is not a problem reserved for certain countries only, but rather, is an international problem that harms many countries; for a description of this attack and the reasons why it was perpetrated.

76. EVEN CHEN, *supra* note 11, at 40.

77. This issue will be discussed at length in the next chapter. *See infra* Part IV.

B. The Principle of Proportionality

The principle of proportionality is the natural derivative of the principle of distinction. Once a particular target has been deemed to be legitimate,⁷⁸ it is necessary to examine the proportionality of the military operation required to attack it, prior to such an attack.⁷⁹ This principle states that a prohibited military operation is an operation in which the damage to humanitarian interests that might arise as a result of it is disproportionately greater than the military benefit expected from the operation.⁸⁰ Article 51(5)(b) of the First Protocol provides that a prohibited military operation is:

[A]n attack which may be expected to cause incidental loss of civilian, injury to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.⁸¹

The significance of this provision is that the attacking party must balance between the damage that will be caused to the civilian population (both in loss of life and injury and in damage to civilian objects) and the military benefit that will be obtained through harming the specific target.⁸² Apart from the duty to balance the damage to humanitarian interests against the expected military benefit, the military force is under a duty by virtue of the principle of proportionality to employ precautionary measures to minimize, as far as possible, the expected auxiliary damage to the civilian population as a result of a military operation.⁸³ We can see that the principle of proportionality erodes, to some extent, the dichotomous distinction between civilian targets that are not legitimate targets of attack and military targets that are a legitimate target of military attack. The

78. *E.g.*, the target is permissible for attack under the rules of international law, and particularly under the principle of distinction which was discussed in the previous chapter. *See supra* Part III, at 212.

79. *See generally* Gross, *Democratic Struggle Against Terrorism*, *supra* note 6, at 217–26; BEN-NAPHTALI & SHANI, *supra* note 31, at 147–50. Proportionality relates to two more terms which I will not discuss in this paper: the principle of military necessity and the right of a state to self-defense. These two terms assist in determining when a particular military operation will be proportionate. The principle of military necessity provides that it is possible to harm humanitarian interests only where such harm serves a military necessity. According to the doctrine of self-defense, military force must be exercised proportionately to the threat.

80. BEN-NAPHTALI & SHANI, *supra* note 31, at 154.

81. First Protocol, *supra* note 55, art. 51(5)(b).

82. Dormann, *Duties*, *supra* note 55, at 16.

83. BEN-NAPHTALI & SHANI, *supra* note 31, at 155.

principle of proportionality, as drafted in Article 51 of the First Protocol, in fact provides that harm to civilian targets is legitimate in the case of auxiliary harm.⁸⁴

With respect to the de facto implementation of the principle of proportionality, three main issues arise. The first relates to the difficulty in foreseeing the outcome of a particular military operation.⁸⁵ A second difficulty is the fact that an assessment of the proportionality of a given military operation is naturally a subjective assessment, and therefore, different lawyers might give different answers regarding the proportionality of the operation.⁸⁶ The third difficulty is the relationship between the principle of proportionality and the wish to protect armed forces. The wish to avoid injury to combatants is a legitimate consideration but it cannot justify a sharp deviation from the principle of proportionality in the event of serious harm to humanitarian interests.⁸⁷

When a state has to deal with the threat of terrorism, the difficulty in implementing the principle of proportionality is even greater, and there are many questions to which there is no response. Terrorist organizations do not operate in accordance with the principle of distinction and hide among the civilian population. Therefore, when the state seeks to harm them, such harm might very reasonably also cause harm to a civilian population or to humanitarian interests. Does the “roof knock” procedure,⁸⁸ employed by the IDF prior to bombing buildings in the Gaza Strip, for instance, accord with the principle of proportionality? And when a message is given to civilians in a building prior to such a bombing,⁸⁹ is this in accordance with the rules of international law? If, after the notice,

84. EVEN CHEN, *supra* note 11, at 116.

85. *See generally* BEN-NAPHTALI & SHANI, *supra* note 31, at 155–56. This difficulty was examined by the Commission that investigated NATO bombings in Yugoslavia. Although the Commission noted that it is easy to recognize the principle of proportionality and hard to implement it, it set a number of subsidiary tests, in addition, which will help in determining whether a certain military operation constitutes a deviation from the principle of proportionality. These tests include: whether there are alternate measures which may be used to obtain a similar military outcome with less damage to humanitarian interests, whether the military forces were actually aware of the expected damage, whether the deviation from the principle of proportionality is a blatant one.

86. *Id.* at 156.

87. *Id.* at 157.

88. In the “roof knock” procedure, an aircraft bombs a building designated for destruction with a low grade explosive first, with the purpose of warning the civilians inside the building that the building is about to be destroyed. Several minutes later, the bomb intended to destroy the building is dropped. *See* Rubi Sebel, *Thoughts on the Goldstone Report and International Law*, 2 L. ON THE SPOT 55, 74 (2000).

89. As happened during Operation Protective Edge, in the summer of 2014. YOAV ZAYTOUN, *Telephone call or SMS before the bomb: the “Roof Knock” Procedure*, YNET (Isr.) (July 8, 2014), <http://www.ynet.co.il/articles/0,7340,L-4539781,00.html>.

civilians consciously choose to remain in the building, is there a duty not to bomb, as a result of the principle of proportionality? These questions show the fact that international humanitarian law does not equip states with suitable tools for combating the threat of terrorism. The principle of proportionality is vague and difficult to implement in every armed conflict, but the difficulty and vagueness are increased in the case of a dispute between a state and a terrorist organization.

In the special context of international terrorism, the requirement of proportionality must be interpreted more broadly than the accepted interpretation with respect to wars between sovereign states. The principle of proportionality is an exception to the principle of distinction, which enables harm to the civilian population and civilian targets under certain circumstances. If we interpret the principle of proportionality in a narrow way, the ability of states to harm terrorists will be harmed since they will not be able to harm terrorists who hide among civilian populations.⁹⁰ A broader interpretation of the requirement of proportionality must balance the need to prevent harm to innocent civilians and the humanitarian interests of the civilian population against the need of a state to protect its citizens against terrorist attacks perpetrated from population centers.

IV. THE STATUS OF TERRORISTS IN INTERNATIONAL LAW

The principle of distinction, as aforementioned, gives rise to the duty set out in international law of distinguishing between civilians and combatants. The classification of a person as a civilian or a combatant will impact on the defenses that he is entitled to, and as result of that, on the possibility of harming him. At present, the status of terrorists is not explicitly defined in international law and therefore, it is necessary to examine whether they fall within the definition of one of the currently existing categories. This section set out each of these categories and the conditions required in order to come within them. Next, this section will examine whether terrorists fall within either of the existing categories, or one of the sub-

90. An example of this can be seen with respect to the use of civilians as human shields. A side that uses its own civilians as human shields clearly perpetrates a war crime. However, the question that arises is what duties apply to the other side in such a situation. Is it permissible to harm such civilians? In the event that they volunteer to be "human shields", do they become combatants? According to the interpretation of the Red Cross, in the event that one side uses civilians as human shields, the other side must act to the best of its ability to avoid harming them, and it makes no difference whether the human shields are voluntary or coerced. *See* Sebel, *supra* note 88, at 65–67.

categories. The answer to this question will be based on two main parameters: first, whether the terrorists meet the conditions required in order to be included in a particular category; and second, whether terrorists should be recognized as being included in the category and therefore as being entitled to all of the protections granted thereunder, in light of the fact that they operate in complete contravention of the rules of international law.

A. Should Terrorists be Recognized as Combatants?

Armed forces are defined in Article 43 of the First Protocol, as follows:

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, 'inter alia', shall enforce compliance with the rules of international law applicable in armed conflict. 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.⁹¹

This Article sets out a number of substantive matters. Firstly, sub-Article (1) provides that the armed forces of a party to a conflict are all of the forces, groups, and units which are under a command responsible for the conduct of its subordinates. This definition is valid, also, in the event that a party to a conflict is represented by a government or an authority that is not recognized by the other party. In addition, the Article imposes a duty on the armed forces to act in accordance with the rules of international law that apply to international armed conflicts. Sub-Article (2) defines combatants as members of the armed forces of one of the parties to the conflict, and therefore as being entitled to participate directly in the hostilities. In addition to this right, international law permits combatants to harm military targets and to kill enemy soldiers,⁹² and prohibits them from being prosecuted for actions taken during wartime.⁹³

As noted above, the legality of a military operation depends, first and foremost, on its purpose. Contrary to the situation with the civilian population, which is, as a rule, protected against attack, it is possible to act militarily against any military target (apart from religious and medical teams),⁹⁴ and it is possible to take legal combatants prisoner until the end of hostilities, even without proving a specific need to hold them.⁹⁵ However, even during

91. First Protocol, *supra* note 55, art. 43.

92. First Protocol, *supra* note 55, art. 48.

93. *Id.* art. 75.

94. Bradley, *supra* note 70, at 398.

95. *Id.*

a military conflict with combat forces, not all actions are permissible. In cases where combatants voluntarily or forcibly leave the arena of combat and are captured by the enemy, they are entitled to the status of prisoners of war. The guiding principles with respect to prisoners of war were set out in the three First Geneva Conventions and the First Protocol. Recognition of combatants as prisoners of war provides them with a considerable number of rights. Inter alia, prisoners of war are entitled to humanitarian treatment, their captors are required to keep them alive and healthy,⁹⁶ and, upon the conclusion of hostilities, they must be immediately released.⁹⁷ In addition, they cannot be prosecuted for their actions during wartime, nor can they be punished for such actions.⁹⁸ There is an exception in cases where international humanitarian law has been breached and particularly in situations that amount to war crimes.⁹⁹

The entitlement to the status of prisoner of war is the most substantial result of belonging to the category of combatant and is the broadest protection granted to those included in this category. Only a legal combatant, who honors the principle of distinction and distinguishes himself from the civilian population, will be entitled to all of the protections afforded by the status of prisoner of war, the first and foremost of which being immunity from criminal prosecution. This rule encourages combatants to act in accordance with the principle of distinction and therefore once again expresses the purpose of international humanitarian law of defending civilians during wartime.¹⁰⁰

As for terrorists, it would appear that according to the definition of “armed forces” in Article 43 of the First Protocol, they cannot be recognized as combatants since they do not constitute a military force belonging to one of the states that are a party to a conflict. Even if it is possible to view a terrorist organization as a military framework that belongs to one of the parties to the conflict, which has a command responsible for the conduct of its subordinates)and therefore does, prima facie, comply with the first part of sub-section (1)) the terrorists, by their actions, methodically breach the rules of international law and therefore, they are not in compliance with the duty set out at the end of the Article.

96. Third Geneva Convention, *supra* note 52, art. 12–13.

97. *Id.* art. 118.

98. Knut Dormann, *The Legal Situation of Unlawful/Unprivileged Combats*, 85 IRRC 45 (2003) [hereinafter Dormann, *Legal Situation*].

99. *Id.*

100. BEN-NAPHTALI & SHANI, *supra* note 31, at 162.

If we recognize members of terrorist organizations as combatants, the consequences of such will be that imprisoned terrorists would be entitled to the status of prisoners of war and the state fighting the terrorist organization would not be able to prosecute them for their actions during fighting.¹⁰¹ If terrorists, who do not comply with international laws, are entitled to the protections that are afforded to combatants, this will in fact create an incentive for deviation from the international laws of war.¹⁰² The conclusion that arises from this is that if we wish to preserve the basic distinction between civilians and combatants during the course of hostilities, we must impose sanctions on those who try to harm this distinction,¹⁰³ and therefore terrorists must not be recognized as legal combatants.

B. Should Terrorists be Recognized as Freedom Fighters?

The 1949 Geneva Conventions were drafted in light of the classic structure of European warfare, and therefore, they did not adopt the idea of including freedom fighters as being legal combatants, with all of the implications of such. The need to recognize freedom fighters arose in the years after the passage of the Geneva Conventions and therefore this issue was added to the First Protocol. In this way, the protection was extended to cover combatants who are not a part of official armed forces.¹⁰⁴ The background for recognition of this sub-category was a colonial reality and an acceptance of the need of civilians living under foreign occupation to fight for their independence and their right to self-determination. The primary legal significance of this recognition was the affording of prisoner-of-war protection to freedom fighters.¹⁰⁵

The Third Geneva Convention, which deals with prisoners of war, sets out the categories of combatants who are entitled to the status of prisoner of war.¹⁰⁶ Among other things, the Convention refers to “organized resistance movements,”¹⁰⁷ which belong to one of the parties fighting in the conflict. Combatants operating in the framework of these organizations will be entitled to prisoner-of-war protection if they fulfill the following cumulative

101. This immunity against prosecution applies subject to their actions not constituting a breach of humanitarian rules, and particularly with respect to war crimes or crimes against humanity. However, it is not possible to prosecute them for criminal offenses committed by them. The result is that it will only be possible to prosecute terrorists in the event that their actions amount to crimes against humanity or war crimes, as such are defined in international law.

102. See Bradley, *supra* note 70, at 401.

103. See Gross, *Democratic Struggle Against Terrorism*, *supra* note 6, at 662.

104. *Id.* at 661.

105. See Third Geneva Convention, *supra* note 52, art. 4.

106. *Id.*

107. *Id.* art. 4(2).

conditions: (1) a person who is responsible for his subordinates is in command of them; (2) they wear identification symbols that are visible from afar; (3) they carry their weapons visibly; (4) they operate in accordance with the rules and customs of war. These conditions, which determine who will be entitled to the status of prisoner of war, are aimed at preserving the distinction between civilians and combatants. The second and third conditions were intended to assist soldiers in distinguishing between enemy forces and the civilian population. The first and fourth conditions were set out with the aim of ensuring that the rules regarding the prohibition against injuring civilians and the duty of combatants to distinguish themselves from the civilian populace are upheld.¹⁰⁸

In addition, the First Protocol expands the definition of combatant and also covers freedom fighters:¹⁰⁹ combatants who are not part of a state or recognized authority, but who are considered to be combatants, and therefore are entitled to prisoner-of-war protection. The Protocol limits the affording of protection only to those who are subject to the international rules that apply to combatants.¹¹⁰ Moreover, a number of other conditions have been set which freedom fighters must comply with in order to obtain the status of prisoners of war. A party to a conflict which brings paramilitary fighters into its forces is under an obligation to inform the other parties of this.¹¹¹ This condition is necessary in order to entitle the combatants to prisoner-of-war protection.¹¹²

As for the status of terrorists, the question that arises is whether, after reaching the conclusion that they cannot be included in the category of combatants, they should be recognized as freedom fighters. As noted above, the actual question is whether terrorists fulfill the four cumulative conditions the performance of which will entitle them to the status of prisoners of war.

With respect to the duty of distinction from the civilian population, which is not upheld in the case of terrorist organizations, the First Protocol set out an exception that provides that a combatant will retain his status

108. John C. Yoo, *The Status of Soldiers and Terrorist under the Geneva Conventions*, 3 CHINESE J. INT'L L. 135, 141 (2004).

109. First Protocol, *supra* note 55, art. 43.

110. *Id.* art. 43(1). This condition is also expressed in Article 4(2)(d) which provides that one of the conditions required in order to be considered a prisoner of war is: "That of conducting their operations in according with the law and customs of war." Third Geneva Convention, *supra* note 52, art. 4(2)(d).

111. First Protocol, *supra* note 55, art. 43(3).

112. Gross, *Democratic Struggle Against Terrorism*, *supra* note 6, at 662–63.

so long as he carries his weapon visibly, even if he does not distinguish himself from the civilian population.¹¹³ The significance of this exception is that the duty of distinction is a relative duty, and in certain circumstances, a combatant will only need to carry his weapon visibly in order for distinction to be made out. In addition, even if combatants do not comply with this single condition, they will be entitled to the status of prisoners of war, including all of the relevant protections, except for immunity against prosecution.¹¹⁴ Israel, the United States, and Great Britain argued that this exception allows terrorists to be recognized as freedom fighters, and as a result, to gain the rights that are owed to prisoners of war, and therefore refused to sign the Protocol.¹¹⁵

Even if, pursuant to the exception, terrorists can be deemed to be freedom fighters, it must be recalled that another condition for recognition is the running of their operations in accordance with the laws and customs of war. Clearly, terrorists do not operate in accordance with the rules of international law and their principal purpose in warfare is to harm civilians. Therefore, the conclusion is that if terrorist organizations and their operatives do not respect the rules of international law and do not act in accordance with them, they cannot be deemed to be freedom fighters and they are not entitled to the protections that are granted to combatants.¹¹⁶

In addition, terrorists do not comply with the conditions of Article 44(3) of the First Protocol, which prescribes situations in which a combatant, or a freedom fighter, loses his status. The purpose of this Article is to ensure the protection of the civilian population against military actions.¹¹⁷ This Article provides that combatants must distinguish themselves from the civilian population when engaging in combat operations and when preparing for them, and if they cannot do so, they must, at least, carry their weapons visibly.¹¹⁸ Terrorists do not distinguish themselves from the civilian

113. First Protocol, *supra* note 55, art. 44(3). This Article is part of the trend which is, to an extent, characteristic of the First Protocol, and that is expansion of the application of international humanitarian law to disputes that are not between states. That is, as noted above, due to the recognition of the right of national liberation organizations to act for their national independence. However, the concern that arises is that the Protocol will be taken too far, since it might encourage terrorist organizations to act in a way that blurs the distinction between civilians and combatants. Alex Markels, *Will Terrorism Rewrite the Laws of War?*, NPR (Dec. 6, 2005), <http://www.npr.org/2005/12/06/5011464/will-terrorism-rewrite-the-laws-of-war> (updated Aug. 2, 2012). See also BEN-NAPHTALI & SHANI, *supra* note 31, at 166–68.

114. BEN-NAPHTALI & SHANI, *supra* note 31, at 167.

115. Gross, *Democratic Struggle Against Terrorism*, *supra* note 6, at 674.

116. *Id.* at 662.

117. *Id.* at 661.

118. *Id.* at 661–62. In such a case, in which combatants/freedom fighters are unable to distinguish themselves from the civilian population but do carry their weapons visibly, they will not lose their status as combatants. *Id.*

population and do not carry their weapons visibly, and therefore they do not meet the conditions of this Article and are not entitled to the protections that apply to freedom fighters.¹¹⁹

Finally, the sub-category of freedom fighters was aimed at recognizing the legitimacy of national liberation wars intended to enable independence and self-determination to peoples subject to colonial occupation.¹²⁰ Those are the armed conflicts that the authors of the Protocols had in mind.¹²¹ The easing of the conditions required in order to obtain recognition as a combatant certainly did not have the intention of justifying a war aimed at destroying a democratic regime and establishing a new world order.¹²² Therefore, it would appear not to be appropriate for a person acting in contravention of the rules of international humanitarian law, who has the aim of harming civilians, to be entitled to the protections granted to freedom fighters.¹²³

C. Should Terrorists be Recognized as Civilians?

Article 50 of the First Protocol defines who is a civilian and who is the civilian population:

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian. 2. The civilian population comprises all persons who are civilians. 3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.¹²⁴

It is clear that a civilian is anyone who does not belong to “armed forces.”¹²⁵ Article 50 is defined negatively and therefore, it would appear, *prima facie*, that anyone who is not a combatant falls under the category of civilian.¹²⁶ The Hague Conventions, the Geneva Conventions and the First Protocol set out, unequivocally, that civilians and civilian targets are

119. *Id.*

120. *See id.* at 662–63.

121. *Id.*

122. EVEN CHEN, *supra* note 11, at 23.

123. Gross, *Democratic Struggle Against Terrorism*, *supra* note 6, at 662.

124. First Protocol, *supra* note 55, art. 50.

125. As defined in Article 43 of the First Protocol. *Id.* art. 43.

126. *Id.* art. 50.

not legitimate targets of attack.¹²⁷ Not only violence against civilians and civilian targets is prohibited, but there is also a prohibition against threatening violence with the principal aim of terrorizing the civilian population.¹²⁸ Protection of the civilian population is also expressed via the precautions that must be taken prior to affecting an attack.¹²⁹ Apart from the general protections of the civilian population, the international laws of war note specific targets that are immune to attack.¹³⁰

It is clear that the protection of civilians is a very broad protection. Combatants are prohibited from intentionally harming the civilian population; they must avoid, as far as possible, harming civilians during the course of hostilities and they must distinguish themselves from the civilian population as well. In addition, civilians are prohibited from taking part in combat operations and they are open to harm when they take part in such operations. These two components are closely connected to one another—a prohibition against soldiers harming the civilian population whilst being attacked by the civilian population would be unfair.¹³¹

As for terrorists, if it is not appropriate to view them as combatants, then a fortiori they must not be viewed as civilians and given the broader protections that are granted to this category. Terrorists are not innocent civilians who are caught up in hostilities, whom international law seeks to protect, but rather, are illegal combatants who take an active part in the hostilities, in breach of the international laws of war.

127. Gross, *Democratic Struggle Against Terrorism*, *supra* note 6, at 661. *E.g.*, First Protocol, *supra* note 55, art. 51. Article 51, headed “Protection of the Civilian Population,” provides, in subsection (1), general protection for the civilian population against “dangers due to military operations,” and subsections (2)–(8) set out specific protections against threats of violence and indiscriminate attacks. *Id.*

128. First Protocol, *supra* note 55, art. 51(2).

129. Firstly, it is necessary to ensure that the targets of the attack are not civilian and that there is no prohibition against attacking them. Secondly, all possible precautionary measures must be taken in order to prevent, or at least to reduce, harm to civilians. Finally, care must be taken to avoid an attack which might be expected to lead to harm to civilians. In addition, care must be taken to avoid placing military targets in or near populated areas. *Id.* art. 57–58.

130. It is prohibited to attack an unprotected location. First Protocol, *supra* note 55, art. 59. It is prohibited to attack hospitals and other medical facilities. Fourth Geneva Convention, *supra* note 53, art. 18; First Protocol, *supra* note 55, art. 12. It is prohibited to attack targets that are vital for the continued existence of the civilian population. First Protocol, *supra* note 55, art. 54.

131. Yoo, *supra* note 108, at 139.

*D. Should Terrorists be Recognized as Civilian
Participants in Warfare?*

The principle of distinction creates, as noted above, two dichotomous categories in international law: civilians and combatants. As a rule, it is prohibited to attack the civilian population and civilian targets, and therefore, they are not a legitimate target for attack. However, there is a limited exception to the prohibition against harming civilians, which is set out in Article 51(3) of the First Protocol:

Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

In other words, in general terms, the civilian population as a rule, and individual civilians in particular enjoy protection from military operations. However, in certain situations civilians can be a legitimate military target when, and for the duration of time during which, they take a direct part in hostilities.¹³² Note that a civilian participating in hostilities does not cease to be a “civilian”, but does become exposed to injury, as a result of participating in the fighting.¹³³ In other words, civilians can be a target for military attack only at the time in which they take part in hostile activities. This can, in fact, be seen as harming the two category approach and as adding a kind of additional sub-category, which blurs the distinction between civilians and combatants.

Professor Schmitt¹³⁴ argues that this Article should be interpreted broadly in order to preserve the protection of the civilian population, for two main reasons. First, a narrow interpretation of the protections that apply to the civilian population are also valid for civilians participating in hostilities, which might cause combatants not to respect the rules of international law because they might wish to defend themselves and harm the civilians that put them in danger. Second, international law must provide an incentive to the civilian population, where possible, to distance itself from the conflict and not take part in it. That has the effect of

132. Bradley, *supra* note 70, at 399.

133. Dormann, *Legal Situation*, *supra* note 98, at 46.

134. See Michael N. Schmitt, “Direct Participation in Hostilities” and the 21st Century *Armed Conflict*, CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: IN HONOUR OF DIETER FLECK, 520, 529 (Horst Fischer et al. eds. 2004) (Ger.).

improving the distinction between armed forces and civilians, thereby reinforcing the protection of the civilian population as a whole.¹³⁵

However, the official Red Cross interpretation narrows the application of the Article. From the interpretation of the term “hostilities,” it would appear that it includes preparations for warfare and return from combat.¹³⁶ However, the interpretation of the term “direct part”¹³⁷ states that only during direct involvement do civilians lose their immunity from harm and become a legitimate target. The implication is that once a civilian stops taking a direct part in hostilities, he is entitled to the protections that apply to civilians and he is no longer a legitimate target of attack.¹³⁸ This interpretation gives rise to the question of the “revolving door”: Can a person be a civilian in daytime, and a combatant at night?¹³⁹

In the context of terrorists, this question becomes even more relevant. The Red Cross’ interpretation might justify itself in the context of “momentary combatants”—civilians who participate in fighting for a defined and limited period of time. On the other hand, terrorists who devote their lives to terrorist activities are not “momentary combatants.” Therefore, they are not civilians participating in hostilities temporarily and for a particular period of time; rather, they are illegal combatants who operate continuously and regularly.

V. THE TARGETED KILLINGS CASE AS A CASE STUDY

The Targeted Killings Case¹⁴⁰ dealt with the legality of the targeted killings policy (“preventative damage”)¹⁴¹ and, *inter alia*, discussed the status of illegal combatants. The concrete issue that the judgment dealt with was whether, by executing a policy of “preventative damage” against terrorists, in which civilians are sometimes injured as well, the State of Israel was acting unlawfully. This case is an example of the Supreme Court’s attempts to deal with the lack of regulation of the status of terrorists in international law. This section will set out, briefly, the main facts that constituted the background to the judgment, and the pleadings by the parties. Further, it will review the judgment of Barak CJ and his approach to the status of terrorists in international law. Finally, this section will

135. *See id.* at 509.

136. Commentary on the Additional Protocols to the Geneva Conventions, ¶ 1943 (Int’l Committee of the Red Cross, June 8, 1977).

137. The meaning of this term is acts of war which might, by their nature, cause very real damage to the persons or equipment of the enemy’s combat forces. *See id.* ¶ 1944.

138. *See id.*

139. Schmitt, *supra* note 134, at 510.

140. *See* HCJ 769/02, Public Committee against Torture in Israel v. Government of Israel, (1) PD 507 (2006) (Isr.) [hereinafter Targeted Killings Case].

141. *Id.*

critique the ruling of the Supreme Court and the implications thereof on the distinction between civilians and combatants.

A. Factual Background

The petition was submitted against “the official targeted killing policy of the State of Israel,”¹⁴² during and after the Second Intifada. This policy constitutes part of the State of Israel’s war against terrorism, and pursuant to it, the security forces harm terrorist operatives who are involved in the “planning, dispatch or perpetration of terrorist attacks against Israel.”¹⁴³ In the course of the targeted killings that have taken place over the years, a number of civilians who were near to the target have also been killed.¹⁴⁴

The petitioners claimed that this policy was illegal under Israeli criminal law and under the rules of international law.¹⁴⁵ One of the central arguments raised by the petitioners was that the international laws of war contained only two categories, combatants and civilians, and that there is no third category of “illegal combatants.” According to the petitioners, since a civilian participating in hostilities does not lose his status as a civilian,¹⁴⁶ operatives in terrorist organizations must be deemed to be civilians.¹⁴⁷ In addition, the petitioners claim that the targeted killings policy was being implemented in contravention of the provisions of Article 51(3) of the Protocol,¹⁴⁸ since they attack terrorists even when they are not taking a direct part in hostilities.¹⁴⁹

The State, on the other hand, claimed that even if terrorists truly did need to be deemed to be civilians, the targeted attacks policy was in compliance with the conditions of Article 51(3). It argued that this section should be broadly interpreted, to avoid the absurd result that terrorists may only be

142. File No. 769/02 HCJ, Public Committee against Torture in Israel v. Government of Israel, ¶ 1–3 (Dec. 11, 2005), Nevo Legal Database (by subscription, in Hebrew) (Isr.) [hereinafter *Petition*].

143. Targeted Killings Case, *supra* note 140, ¶ 2.

144. *See id.*

145. *Petition*, *supra* note 142, at 4, 5.

146. As discussed in the previous Chapter, a civilian participating in hostilities can only be attacked during the time in which he takes a direct part in the hostilities, and it is not possible to harm him at other times (as distinct from a combatant).

147. Targeted Killings Case, *supra* note 140, ¶ 5.

148. “Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.” First Protocol, *supra* note 55, art. 51(3).

149. *See Targeted Killings Case*, *supra* note 140, ¶ 6.

injured when they in fact commit a terrorist attack and not during the planning of or returning from performance of the operation.¹⁵⁰

In his Judgment, Barak CJ discussed the question of the status of terrorists in international law and the question of whether they must be deemed to be civilians or combatants.¹⁵¹ He ruled that terrorist organizations and their operatives must not be deemed to be combatants, since they do not make themselves subject to the international laws of war and do not wear prominent identifying symbols.¹⁵² In his view, terrorists are illegal combatants; therefore, are not entitled to the status of prisoners of war and can be judged on their actions.¹⁵³

However, according to Barak CJ, since a civilian is defined as anyone who is not a combatant,¹⁵⁴ terrorists are civilians. According to the Chief Justice, the approach taken by international law is that illegal combatants must be deemed to be civilians because they are not combatants (since, as aforesaid, this category is defined by negation). Therefore, they are not entitled to all of the protections granted to civilians and are not protected against attack, so long as they take part in the hostilities.¹⁵⁵ In other words, an illegal combatant does not lose his status as a civilian, but when he perpetrates a terrorist act, he is no longer entitled to the protections afforded to civilians and he becomes open to harm just like a combatant. On the other hand, he is not entitled to the protections granted to combatants nor to the status of prisoner of war. The Chief Justice based his argument on Article 51(3) of the First Protocol.¹⁵⁶

B. Critical Analysis of the Judgment

The interpretive process employed by the Chief Justice in this Judgment can be critiqued on three levels: the first critiques the suitability of the exception in Article 51(3) to terrorists; the second relates to the expansion of the category of civilians, and the risk of breaching international law which stems from that; and the third deals with the State of Israel's ongoing need to confront the threat of terrorism and the concern that this expansion of the category of civilians is not the required solution in such cases.

150. *Id.* ¶ 12. As set out in the previous chapter, the State's position in the Judgment accords with that of Prof. Schmitt.

151. *Id.* ¶ 23.

152. *Id.* ¶ 24.

153. *Id.* ¶ 25.

154. *See* First Protocol, *supra* note 55, art. 50.

155. Targeted Killings Case, *supra* note 140, ¶ 26–31.

156. *Id.* ¶ 30. Although Israel is not a signatory to this Protocol, the Supreme Court has accepted the Red Cross' position that this is a customary principle of international law and, therefore, it applies to states that are not a party to it as well.

First, the wording of Article 51(3) of the First Protocol shows that it was aimed at dealing with a situation in which a civilian takes an active part in warfare, *for a particular period of time*. Terrorists, on the other hand, are not civilians taking part in warfare for a particular period of time; rather, they are operatives in warfare for the duration of their lives. Therefore, the question that arises is whether the Article is suitable to this situation, in which the participation in warfare is not temporary. In my opinion, the Article was not intended to protect a civilian who becomes a full-time combatant, and therefore, there is no room for inclusion of terrorists who devote their lives to terrorism in the Article.¹⁵⁷

Second, Barak CJ expands the category of civilians too far, thereby exposing Israel to claims of breach of international law. The expansion of the category of civilians might lead to civilians who are not illegal combatants being suspected of being such, which exposes them to harm. In addition, the Article allows harm to be made to terrorists *only* when they are actually perpetrating acts of terrorism and not at the rest of the time. The significance of this is that it will not be possible to harm terrorists while they are planning terrorist attacks or when going to or from terrorist activities.¹⁵⁸ A criticism that was leveled at the Judgment argued that its disregard of the requirement of taking a “direct part” in an operation weakens the protection that humanitarian law grants to civilians.¹⁵⁹ Many commentators of international law give the term “direct part in the hostilities” that appears in Article 51(3) a narrow interpretation, which might view harm to terrorists at times between terrorist operations as being illegal harm.¹⁶⁰

Third, over time, this expansion of the category of civilians might not be sufficient in the ongoing legal handling of terrorist organizations.¹⁶¹ If terrorists fall within the category of civilians, then they must not be harmed and they certainly must not be harmed intentionally. When a state is in an ongoing conflict with a terrorist organization, it might be presumed that it would seek to harm terrorists not only when they are in fact committing hostile acts, but also during the planning stages, during the dispatch stages, and during the intervening time. Therefore, as could be

157. For a more comprehensive discussion, see Part IV.

158. Bradley, *supra* note 70, at 402.

159. Kristen E. Eichensehr, *On Target? The Israeli Supreme Court and the Expansion of Target Killings*, 116 YALE L.J. 1873 *passim* (2008).

160. Bradley, *supra* note 70, at 406.

161. *See id.*

seen during the United States' war in Afghanistan,¹⁶² countries that are in an ongoing conflict with a terrorist organization might deviate from the two-category approach by harming operatives in terrorist organizations under conditions that do not accord with the provisions of Article 51(3) of the First Protocol.

In conclusion, this case is a test case that illustrates the difficulties in including terrorists in the category of civilians participating in hostilities. International law recognizes the importance of protecting civilians during the course of hostilities. Clearly, the basic categorization that distinguishes between combatants and civilians is intended to protect the civilian population during wartime and to reduce the harm to it as far as possible. Should this broad protection be afforded to operatives of terrorist organizations seeking to harm the civilian population who do not view themselves as being subject to the rules of international law? The answer to this, in my opinion, is negative. Therefore, terrorists must not be viewed as civilians or even as civilians participating in hostilities.

VI. RECOGNITION OF A THIRD CATEGORY

In Part IV, we examined the status of terrorists in light of the two category approach. We noted that terrorists are not included under the category of combatants, nor even under the sub-category of freedom fighters. Therefore, they are not entitled to the protections granted to such category or recognition of the status of prisoners of war.¹⁶³ As a result, we have reached the conclusion that if they cannot be deemed to be combatants, then a fortiori they cannot be deemed to be civilians, and they cannot be granted the broad protections that apply to this category.¹⁶⁴

In Part V, we set out how this lack of regulation is expressed in the judgments of the Supreme Court of Israel, and we examined the implications of “stretching” the category of civilians on the protections afforded to the civilian population. Specifically, this article examined whether Article 51(3) of the First Protocol, which deals with civilians who take an active part in hostilities, might be suitable to cover terrorists, as argued in the Judgment. The conclusion arising from the critique of the Judgment is that Article 51(3) of the First Protocol does not provide the appropriate response with respect to the way in which a state might handle terrorist organizations and their operatives, and reinforces the argument that there is, at present, no appropriate regulation of the question of terrorism in

162. A discussion of the United States approach to the question of illegal combatants is found in Part VI. *See infra* at 234–37.

163. Third Geneva Convention, *supra* note 52, art. 4.

164. First Protocol, *supra* note 55, art. 51(4).

international law. The fact that it is only possible to justify harm to terrorists under Article 51(3) shows that international law contains no response to the current situation.

This section will discuss the characteristics of a third category, the rights and obligations that it would grant to those who fall within it. First, it will examine how it provides a response to the problems flowing from the two-category approach with respect to terrorist organizations. Second, this section will also set out the approach taken by the Red Cross, which is responsible for the interpretation of international humanitarian law, with respect to recognition of the third category and to states' confrontations with the threat of international terrorism. Finally, this section will examine the developments in three countries—the United States, Great Britain and Israel—which have, in their national legal systems, created a third category of “illegal combatants.”

A. Definition of the Third Category

It is clear that none of the existing categories of humanitarian law provides a response to how a democratic state should handle international terrorism. The existing categories, in the current situation, harm the distinction between civilians and combatants and endanger the civilian population on both sides of an armed conflict. In addition, terrorists who do not comply with the rules of international law and who do not operate in accordance with the laws of war end up benefiting from this. Therefore, there would appear to be no choice but to adapt international law to the current reality and to add a third category of illegal combatants to the laws of war.

According to Professor Bradley, despite the fact that the two-category approach might appear to be the approach that affords the greatest protection of civilian freedoms, it is unclear whether this is the case with respect to an armed conflict between a state and a terrorist organization.¹⁶⁵ If the terror organization and its operatives are included in the category of civilians, then it is reasonable to presume that this category should also be “stretched” in order to adapt to the security requirements of the state. The final outcome might be a decrease in the protection of civilians who do not take an active part in hostilities. Although the three category approach is less anchored in international treaties than the two category approach,

165. Bradley, *supra* note 70, at 397.

it is more suited to a situation in which states need to deal with terrorist organizations.¹⁶⁶

Despite the fact that the term “illegal combatant”¹⁶⁷ does not appear in the Geneva Conventions, it has been frequently used in legal writing, military guides and judgments. The use of this term is not uniform, and it is hard to determine the boundaries of the category; however, we can see that it relates to persons who take part in hostilities despite not being entitled to do so.¹⁶⁸ An example of this could be seen in World War II, where international law permitted armies to use a heavy hand against illegal combatants and even kill them after taking them captive. On the other hand, legal combatants, who distinguished themselves from the civilian population, were entitled to protection as prisoners of war when in captivity. This distinction was a significant incentive for combatants to operate in accordance with the laws of war and to distinguish themselves from the civilian population.¹⁶⁹

B. The Position of the Red Cross

When we think of the Red Cross, we tend to think of its function as administering aid to civilians harmed in violent conflicts. However, a lesser-known and significant role of the Red Cross is its function as the gatekeeper of international humanitarian law. The Red Cross was involved in the drafting of the Geneva Conventions and was responsible for wording the drafts of the Conventions that form the basis for the Conventions that were ultimately passed.¹⁷⁰ Therefore, the position taken by the Red Cross with respect to illegal combatants is significant, both in examining why no definition of this category has yet been accepted into international law and in understanding whether there might be a chance of soon seeing a change in the position taken by international law with respect to terrorism and the development of a third category.

According to the position taken by the Red Cross, the Geneva Conventions are the cornerstone of the protection and preservation of human dignity during armed conflicts.¹⁷¹ The Conventions assisted in preventing

166. Bradley, *supra* note 70, at 411.

167. “Illegal combatant” may be interchangeable with “unlawful combatant” or “unprivileged combatant/belligerent.”

168. Dormann, *Legal Situation*, *supra* note 98, at 46.

169. Jason Callen, *Unlawful Combatants and the Geneva Convention*, 44 VA. J. INT’L L. 1025, 1026 (2003).

170. Anna Segal, *Why and How the International Committee of the Red Cross Supported the Establishment of the International Criminal Court*, 9 HAMISHPAT 85, 86–87 (2004).

171. *Basic rules of the Geneva Convention and their Additional Protocols*, ICRC (1988), <http://www.geneva-academy.ch/RULAC/pdf/ICRC-Basic-Rules-in-the-1949-Geneva-Conventions-and-1977-Additional-Protocols.pdf>.

and limiting human suffering in wars in the past, and they have remained relevant to modern military conflicts. Although some of the rules might require reform, the core of the Geneva Conventions is no less relevant today than it was sixty years ago.¹⁷² The Red Cross is aware that during the decades following adoption of the Geneva Conventions and the other Protocols, armed conflicts have arisen in many places around the world, which breached humanitarian international law. However, the common conception is that these breaches do not stem from the lack of compatibility of the Conventions and Protocols to wars that are currently taking place, but are a result of lack of enforcement, an unwillingness to obey the rules, and lack of awareness.¹⁷³

International humanitarian law permits persons belonging to the armed forces of a state which is a party to an international armed conflict, as well as militias that are related to the dispute and that comply with the requisite conditions,¹⁷⁴ to participate directly in the hostilities. These combatants are considered “legal combatants,”¹⁷⁵ and the implications of this are that they cannot be prosecuted for any hostile actions that they perpetrate during the course of fighting, so long as they act in accordance with the international laws of war.¹⁷⁶ In addition, if taken captive, the combatants are entitled to the status of prisoners of war.¹⁷⁷ As distinct from legal combatants, civilians who choose to engage in hostile activities are considered “illegal combatants” and are liable to being prosecuted under the local law of the arresting country for such activities. The Red Cross recognizes the fact that the humanitarian law conventions do not contain the term “illegal combatant” expressly. It should be noted that the status of prisoners of war is not granted to persons who do not lawfully take part in warfare.¹⁷⁸

With respect to terrorism, the Red Cross argues that one of the primary achievements of the First Protocol relates to the limitations that it imposes

172. Knut Dormann, *The Geneva Conventions Today*, ICRC (July 9, 2009), <http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-090709.htm> [hereinafter Doermann, ICRC].

173. Jean-Marie Henckaerts, *Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict*, 87 (857) INT'L REV. OF THE RED CROSS 3, 4 (2005).

174. *Supra* Part IV.

175. They may also be called “lawful or privileged combatants.”

176. Dormann, *Legal Situation*, *supra* note 98, at 45.

177. *Id.*

178. *The relevance of IHL in the context of terrorism*, ICRC (Jan. 1, 2011), <http://www.icrc.org/eng/resources/documents/faq/terrorism-ihl-210705.htm> [hereinafter *Relevance*, ICRC].

on combat methods and measures, with the aim of protecting civilians.¹⁷⁹ The Protocol unequivocally prohibits terrorist acts, attacks on civilians and civilian targets,¹⁸⁰ and acts of violence or threats that aim to sow panic among the civilian population. Persons suspected of acts of this kind can be prosecuted. The First Protocol only provides protection for organizations and individuals who operate on behalf of a state or of “some other subject” in international law. Therefore, terrorist organizations operating on behalf of themselves and without connection to any other entity are not entitled to the status of prisoners of war.¹⁸¹

A development of the Red Cross’ policy can be seen in the “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.”¹⁸² The principal recommendations of the paper relate to civilians participating in hostilities in national conflicts:

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”).¹⁸³

This recommendation actually distinguishes civilians participating in hostilities temporarily from civilians who join combat organizations and operate as combatants for such organizations. The significance is recognition of the status of a “continuous combat function,” which is similar to the status of a legal combatant. The persons covered by this category are members of organized armed groups which do not belong to a state. The implications of this status is that a person who falls within it loses the protection granted to civilians against harm, and therefore becomes a legitimate target of military attack. However, the status is different from that of a combatant in that a person who falls into the category of a “continuous combat function” is not entitled to the status of a prisoner of

179. We may note that Israel objected to joining the First Protocol, one of its arguments being that it encourages guerilla organizations to employ terrorist fighting tactics. See Ruth Lapidot, Yuval Shany & Ido Rosenweig, *ISRAEL AND THE TWO ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS* (Daphna Schweppe ed. (2011) (Isr.).

180. First Protocol, *supra* note 55, art. 51(2).

181. *Relevance*, ICRC, *supra* note 178.

182. ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (May 2009) [hereinafter ICRC, *Guidance*]. This paper focused on three main issues: Who is contained within the category of civilians, what is direct participation in hostilities and what is the significance of removal of the protections granted to the civilian population from civilians who participate in hostilities.

183. *Id.* at 16.

war.¹⁸⁴ In addition, contrary to civilians who lose their protection against attack only for the period of time in which they perpetrate hostile acts, those who perform a “continuous combat function” are not protected against attack, so long as they continue in their position.¹⁸⁵

In contrast, with respect to international armed disputes, the Red Cross’ conclusion in this Guidance is that persons who take an active part in the hostilities but who are not part of the regular army of one of the parties to the conflict are civilians under the Hague Regulations, the Geneva Conventions and the First Protocol.¹⁸⁶ The Targeted Killings case is an example of a national incident that reflects this position, as it held that under the rules of humanitarian law that regulate international armed conflicts, terrorists must be classified as civilians who take part in hostilities.¹⁸⁷ Additionally, in a conference that took place in 2009, the Red Cross declared that the organization objected to the development of a third category of “illegal combatants” and that it finds it hard to understand the deficiency in international humanitarian law.¹⁸⁸

One of the explanations given by the Red Cross for classifying terrorists as civilians is that if they are classified differently, this could lead to harm to the dichotomy between civilians and combatants.¹⁸⁹ I argue that this reasoning has no foothold in reality. Terrorists, by their very nature, harm this dichotomous distinction, since they act from within population centers with the purpose of harming their enemy’s civilians. The result of this position by the Red Cross might in fact be protection of terrorists, instead of the protection of innocent civilians. The clear bottom line is that despite the fact that there has been some progress in the laws of war regarding national conflicts, the Red Cross insists that the laws that exist regarding international conflicts are sufficient. It is unclear why it is the Red Cross,

184. EVEN CHEN, *supra* note 11, at 337.

185. ICRC, *Guidance*, *supra* note 182, at 17.

186. *Id.* at 23.

187. Targeted Killings Case, *supra* note 140, para. 25.

188. Dormann, ICRC, *supra* note 172:

With these avenues available to States, it is not clear to the ICRC what additional measures should or can be applied to so-called “unlawful” combatants without running the risk of seriously violating basic standards of humanity. In other words, what is lacking? Obviously, we do not subscribe to the view that standards prohibiting torture and other forms of ill-treatment should be revisited. We also do not believe that judicial guarantees should be relaxed as fair trial is a fundamental safeguard of international law.

Id.

189. ICRC, *Guidance*, *supra* note 182, at 23–24.

which is supposed to be the “gatekeeper” of humanitarian law, is objecting to the development of new laws that would adapt the laws of war to modern warfare against terrorist organizations.

C. Actual State Recognition of the Third Category

Although the term “illegal combatants” does not appear in the Geneva Conventions, it is expressed in the policies of states with respect to their own internal laws. More than sixty years ago, during the Second World War, the Supreme Court of the United States recognized the distinction between legal combatants and illegal combatants:

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations, and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but, in addition, they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.¹⁹⁰

However, many only heard the term in 2001, when the Bush Administration decided to classify Taliban and Al-Qaida fighters as illegal combatants.¹⁹¹ The significance is that they can be harmed and arrested, similar to combatants, but they are not entitled to the status of prisoners of war. In this way, the United States recognized a third category alongside the two existing categories of combatants and civilians.¹⁹²

In Great Britain, recognition of the third category stemmed from the refusal to view guerilla fighters as legal combatants. In contrast to the United States (and Israel, as will be shown below), Britain recognized the third category in the British Army Field Manual, but not in a statute.¹⁹³ Additionally, the British Court has held that in the event that combatants (whether guerilla fighters or combatants belonging to a regular army) do not distinguish themselves from the civilian population, they are not entitled to the status of prisoners of war.¹⁹⁴

190. *Ex parte Quirin*, 317 U.S. 1, 30–31 (1942).

191. Callen, *supra* note 169, at 1025.

192. Bradley, *supra* note 70, at 399.

193. U.K. WAR OFFICE, MANUAL OF MILITARY LAW, PART I, THE LAW OF WAR ON LAND 96 (1956). Note that in the United States, in addition to the provision in the statute, the third category is also recognized in the US military law handbook: See JUDGE ADVOCATE GEN.’S SCH., OPERATIONAL LAW HANDBOOK 6 (Jeanne M. Meyer & Brian J. Bill eds., 2002), www.supremelaw.org/authors/jag/Operational.Law.Handbook.doc.

194. *Mohamed Ali v. Pub. Prosecutor* [1969] 1 AC 430 (PC) (appeal taken from Malay.), [1968] 3 All E.R. 488 (UK).

Israel has recognized the existence of the third category as well. In 2002, the Imprisonment of Illegal Combatants Law was enacted,¹⁹⁵ the purpose of which was to regulate the imprisonment of “illegal combatants who are not entitled to the status of prisoners of war, in such a way as to accord with the State of Israel’s obligations under the provisions of international humanitarian law.”¹⁹⁶ An illegal combatant is defined in section 2 of the Law as follows:

A person who takes part in hostile activities against the State of Israel, either directly or indirectly, or who is part of a force that perpetrates hostile activities against the State of Israel, to whom the conditions that grant a prisoner-of-war status under international humanitarian law, as set out in Article 4 of the Third Geneva Convention of August 12, 1949 with respect to the treatment of prisoners of war, do not apply.¹⁹⁷

Pursuant to this section, a person who takes part in hostilities against the State and who does not fall within the paradigms in the various international conventions, falls within this definition and constitutes an illegal combatant. This Law can be viewed as partial recognition of the third category of illegal combatants in Israeli law, since it only relates to the question of imprisonment of them and does not relate to the possibility of harming them. However, the Law provides explicitly that illegal combatants are not entitled to the status of prisoners of war.

VII. CONCLUSION

The current situation, and particularly the spread of international terrorism, requires a reconsideration of international laws. These laws, which were drafted during a period when wars were characterized by states fighting other states, have not been adapted to modern warfare in which states are required to fight terrorist organizations. Recognition of a third category would equip states with additional tools in their fight against terrorist organizations and their operatives, and would assist in preservation of the basic distinction between civilians and combatants.

We have seen that international law has not yet adopted a universal, agreed upon definition of the term terrorism, which is not even included as one of the offenses that fall within the jurisdiction of the International Criminal Court. It is possible that multiple acts of terrorism, causing harm to so many

195. Incarceration of Unlawful Combatants Law, 5762-2002, KT 5741 p. 948 (Isr.).

196. *Id.* at § 1.

197. *Id.* at § 2.

states around the world, might affect the acceptance of a definition of terrorism and the inclusion thereof within the jurisdiction of the ICC, and would equip states with suitable tools in their fights against terrorism.

To this lack of a definition of terrorism, we can add the two category approach, which provides that international law recognizes only two categories—combatants and civilians. An examination of the compatibility of terrorists to this categorization shows that they cannot be ascribed to either of the existing categories (nor to any of the sub-categories of freedom fighters or civilians participating in hostilities). An examination of the Targeted Killings Case shows that the attempt to tailor humanitarian law, as currently worded, to a situation of terrorism, might, at the end of the day, lead to harm to the basic distinction between combatants and civilians, and as a result, might miss the point of humanitarian law, which is to protect the civilian population during wartime.

The increase in international terrorism, and the fact that it is a factor that threatens the routine lives of civilians in most countries around the world, justifies the adoption of a new legal concept with respect to the status of terrorists in international law—a concept which would recognize a third category of illegal combatants as an additional category in the laws of war which would be suited to the war against international terrorism. As can be seen, states have started to recognize this category in their own national laws, in order to deal with the threats of terrorism. The Red Cross should be attentive to the changes that are in fact taking place in the nature of wars, and should advance the adaptation of the laws of war to the currently existing situation. That is, first and foremost, in order to preserve the dichotomous distinction between civilians and combatants, and as far as possible, to prevent harm to civilians and to humanitarian interests.